

Poratha Corp Sdn Bhd v Technofit Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO W-02(C)-2122-10 OF 2017
TENGKU MAIMUN, MARY LIM AND HASNAH HASHIM JJCA
22 JULY 2019

Contract — Termination — Wrongful termination — Whether clause in subcontract providing for manner in which it could be terminated not adhered to — Whether termination premature, unlawful and invalid — Whether subcontractor entitled to be compensated for losses caused by the termination — Whether counterclaim against subcontractor not proven

The main issue in the instant appeal was whether the respondent's termination of the appellant as its subcontractor to carry out certain piping works in a construction project was premature, unlawful and invalid. The respondent contended that, inter alia, the appellant failed to deploy sufficient manpower to carry out the works resulting in gross delays in adhering to completion timelines. It was also alleged that the appellant's work was shoddy and defective. The appellant, on the other hand, blamed the delays on the respondent's delay in supplying materials for the job, failure to provide sufficient trailers and cranes to shift the materials and to fabrication mistakes in the piping received by the appellant. The appellant claimed that although it had carried out a substantial portion of the subcontract, the respondent terminated it prematurely, causing the appellant to suffer losses. In response to the appellant's suit for the losses, the respondent counterclaimed for monies it had spent to complete the works left uncompleted by the appellant and to rectify defective works. Following a trial, the High Court agreed with the respondent's contentions and ruled that the termination of the subcontract was valid and lawful. The appellant's claim was dismissed and the counterclaim was allowed. The instant appeal was against the trial court's decision.

Held, allowing the appeal, setting aside the decision of the High Court, allowing the appellant's claim and dismissing the respondent's counterclaim:

- (1) The appellant had proven its claim that the termination of the subcontract was premature and invalid and that as a result it suffered losses. The respondent, on the other hand, failed to discharge the burden of proving its counterclaim (see para 48).
- (2) The trial judge had found that the appellant failed to proceed expeditiously and was behind the scheduled completion. Whilst the judge was right to observe that there was delay, he should have examined

- A the terms of the subcontract, in particular cl 12.1, before concluding whether or not the termination was valid or otherwise. Clause 12.1 clearly provided that if the appellant failed to remedy within 14 days the default stated in a notice issued to it by the respondent, the respondent might by a second notice given within a further period of 21 days,
- B terminate the contract. In the present case, the respondent issued the notice of termination 14 days after issuing the notice of default, without allowing the appellant the further 21 days stipulated in cl 12.1. This was clear non-compliance with cl 12.1 which rendered the termination of the subcontract premature, invalid and wrongful. The appellant should have
- C been given an opportunity to meaningfully remedy any unsatisfactory performance or default within the given time-frame to justify termination. The trial judge had completely disregarded the terms of the agreement between the parties, particularly cl 12.1, and had wrongly concluded that the termination was valid (see paras 30–36 & 39).
- D (3) Given this court's finding that the termination of the subcontract was premature and unlawful, the appellant was entitled to the 'idle manpower' costs of RM1,522,327 and the costs for direct and indirect expenses of RM97,208.14 with interest at 5%pa from date of judgment until date of full settlement. The direct and indirect costs were not too
- E remote and were, in fact, foreseeable losses that the appellant suffered as a result of the premature termination. The appellant's claim was supported by the evidence adduced (see paras 41–42).
- F (4) The trial judge should have dismissed the respondent's counterclaim on finding that it was not fully supported by documentary evidence. The respondent bore the burden of proving both the fact and the amount of damages suffered as a result of the appellant's alleged breach. Special damages, unlike general damages, had to be specifically pleaded and strictly proved to be recoverable (see paras 45 & 47).

G **[Bahasa Malaysia summary]**

- Isu utama dalam rayuan ini adalah sama ada penamatan perayu oleh responden sebagai subkontraktornya untuk menjalankan kerja perparitan tertentu dalam projek pembinaan adalah pramatang, menyalahi undang-undang dan tidak
- H sah. Responden berhujah bahawa, antara lain, perayu telah gagal mengerahkan tenaga manusia yang mencukupi untuk menjalankan kerja tersebut yang mengakibatkan kelewatan melampaui dalam mematuhi tempoh masa siap. Ia juga dikatakan bahawa kerja perayu kurang bermutu dan defektif. Perayu, sebaliknya, menyalahkan kelewatan tersebut kerana kelewatan responden membekalkan bahan untuk kerja tersebut, gagal untuk menyediakan treler dan kren yang mencukupi untuk mengalihkan bahan dan kesilapan fabrikasi dalam paip yang diterima oleh perayu. Perayu telah mendakwa bahawa meskipun ia telah melaksanakan sebahagian besar subkontrak itu, responden telah menamatkannya secara pramatang, menyebabkan perayu mengalami
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kerugian. Dalam menjawab guaman perayu untuk kerugian, responden menuntut balas untuk wang yang telah dibelanjakannya bagi menyelesaikan kerja tinggal yang tidak disiapkan oleh perayu dan untuk memperbetulkan kerja yang defektif. Berikutan perbicaraan, Mahkamah Tinggi bersetuju dengan hujah responden dan memutuskan bahawa penamatan subkontrak adalah sah dan mematuhi undang-undang. Tuntutan perayu ditolak dan tuntutan balas dibenarkan. Rayuan ini adalah terhadap keputusan mahkamah perbicaraan.

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Diputuskan, membenarkan rayuan, mengetepian keputusan Mahkamah Tinggi, membenarkan tuntutan perayu dan menolak tuntutan balas responden:

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- (1) Perayu telah membuktikan tuntutannya bahawa penamatan subkontrak adalah pramatang dan tidak sah dan akibatnya ia mengalami kerugian. Responden, sebaliknya, gagal melaksanakan beban membuktikan tuntutan balasnya (lihat perenggan 48).

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- (2) Hakim perbicaraan mendapati perayu telah gagal meneruskan dengan segera dan lewat mengikut tempoh siap. Manakala hakim adalah betul untuk memerhatikan bahawa terdapat kelewatan, beliau patut memeriksa terma-terma subkontrak, terutamanya klausa 12.1, sebelum membuat kesimpulan sama ada atau tidak penamatan adalah sah atau sebaliknya. Klausa 12.1 jelas memperuntukkan bahawa jika perayu gagal memberi remed dalam 14 hari kegagalan yang dinyatakan dalam notis yang dikeluarkan kepadanya oleh responden, responden boleh melalui notis kedua memberikan dalam tempoh lanjut 21 hari, menamatkan kontrak itu. Dalam kes ini, responden telah mengeluarkan notis penamatan 14 hari selepas mengeluarkan notis kegagalan, tanpa membenarkan perayu lanjutan 21 hari yang dinyatakan dalam klausa 12.1. Ia jelas suatu ketidakpatuhan klausa 12.1 yang menjadikan penamatan subkontrak pramatang, tidak sah dan menyalahi undang-undang. Perayu patut diberikan peluang untuk meremedikan dengan berkesan apaapa pelaksanaan yang tidak memuaskan atau kegagalan dalam tempoh masa yang diberikan bagi mewajarkan penamatan. Hakim bicara langsung tidak mengambil kira terma-terma perjanjian antara pihak-pihak, terutamanya klausa 12.1, dan terkhilaf membuat kesimpulan bahawa penamatan itu adalah sah (lihat perenggan 30–36 & 39).

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- (3) Berdasarkan dapatan mahkamah bahawa penamatan subkontrak itu adalah pramatang dan menyalahi undang-undang, perayu berhak kepada kos 'idle manpower' sejumlah RM1,522,327 dan kos untuk perbelanjaan langsung dan tidak langsung berjumlah of RM97,208.14 dan kadar faedah pada 5% setahun dari tarikh penghakiman hingga tarikh penyelesaian penuh. Kos langsung dan tidak langsung tidak begitu

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- A terpengcil dan, sebenarnya, kerugian yang boleh diramal yang ditanggung oleh perayu akibat penamatan awal. Tuntutan perayu disokong oleh keterangan yang dikemukakan (lihat perenggan 41–42).
- B (4) Hakim perbicaraan sepatutnya menolak tuntutan balas responden berdasarkan dapatan bahawa ia tidak disokong sepenuhnya dengan keterangan dokumentar. Responden menanggung beban membuktikan kedua-dua fakta dan jumlah ganti rugi yang dialami akibat pelanggaran yang dikatakan perayu. Ganti rugi khas, tidak seperti ganti rugi am, patut secara khusus dipli dan dengan tegas dibuktikan boleh dipulihkan (lihat perenggan 45 & 47).]
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Cases referred to

- Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)
- D *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98; [1998] 1 WLR 896, HL (refd)
- Kerajaan Malaysia v Ven-Coal Resources Sdn Bhd* [2014] 11 MLJ 218, HC (refd)
- E *Lucy Wong Nyuk King (F) & Anor v Hwang Mee Hiong (F)* [2016] 3 MLJ 689; [2016] 4 CLJ 813, FC (refd)
- Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30; [1984] 2 CLJ 163, FC (refd)
- Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324; [1983] 2 CLJ 198, FC (refd)
- F *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (refd)
- Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672 (refd)
- G *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1994] 1 CLJ 15, FC (refd)
- Teknik Segala Sdn Bhd v Salcon Engineering Bhd* [2012] 9 MLJ 529, HC (refd)
- Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor* [2012] MLJU 159; [2012] 5 CLJ 229, CA (refd)
- H **Appeal from:** Civil Suit No 22C-41–07 of 2016 (High Court, Kuala Lumpur)
- Sandosh Anandan (Guanaletchumi a/p Alagan with him) (Sandosh Anandan) for the appellant.*
- I *Mohd Ya'acob bin Bakanali (Azmer Md Saad with him) (Lainah Yaacob & Zulkepli) for the respondent.*

Hasnah Hashim JCA (delivering judgment of the court):

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[1] This appeal by the appellant is against the decision of the Kuala Lumpur High Court which had allowed the appellant's claim in part for the sum of RM1,651,383.57 and ordered the sum of RM506,023.67 to be paid by the appellant to the respondent to complete the balance of works as well as the forfeiture of the retention sum of RM437,838.17 towards full settlement of the rectification works.

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[2] For the purpose of this judgment, the parties will be referred to as they were in the High Court.

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THE FACTUAL BACKGROUND

[3] This appeal concerns a claim for premature and wrongful termination of the subcontract by the defendant and as a result the plaintiff suffered direct losses. The undisputed facts are as follows. The defendant entered into a contract with DAELIM (M) Sdn Bhd ('DAELIM') for the construction of Mechanical Work Package 2 for Fast Track Project 3A in Manjung, Perak ('the main contract'). The defendant appointed the plaintiff as the subcontractor on 22 December 2015 to carry out the Mechanical Work Package 2-Piping Works in particular welding and installation of P92 pipe ('the subcontract works'). The value of the subcontract works is RM6,345,000.36.

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[4] The parties had a number of meetings and it was agreed that the minutes of meetings were to be incorporated as part of the terms and conditions of the subcontract works agreement ('the agreement'). The agreement specified, amongst others, the contractor's scope of works, work program, HSE obligations for the defendant's contractor/subcontractor ('OFC'), pricing schedules and bills of quantities. Pursuant to cl 2 of the agreement the plaintiff is required to implement the subcontract works in accordance with the master work program schedule as well as the scope of work based on the RFQ documents attachment 2A-addendum 1. The plaintiff's scope of work covered ten major areas as stated in the addendum to the RFQ documents.

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[5] The agreed scope of works of the plaintiff under the agreement are as follows:

- (a) installation of pipe (fabrication and erection of pipe and its supports, receiving, launching, marking, fit-up, welding, reporting, testing and commissioning, final document submission);
- (b) supply of manpower for commissioning activities;
- (c) provide accommodation and food for workers; and

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- A (d) provide consumables and transport.

[6] The plaintiff immediately mobilised its workers on 17 October 2015. However, the piping works were delayed primarily due to the following reasons:

- B (a) delay in the supply of material by the defendant;
(b) the defendant failed to provide sufficient trailers and cranes to shift the materials; and
C (c) fabrication mistake in the spools received from DAELIM.

- D [7] It is the plaintiff's case that the defendant without providing any reason or giving any prior notice, terminated the agreement prematurely even though the plaintiff completed a substantive portion of the subcontract works. The plaintiff carried out the subcontract works until 27 May 2016 and invoiced the defendant for the works done. The defendant, however, failed to pay the sum of RM2,027,955.34, that is, the balance sum as stipulated in the invoice for the works done.

- E [8] The subcontract works was scheduled to commence on 16 October 2015 and the scheduled completion was 15 September 2016. Prior to the commencement of the subcontract works, a number of meetings were held between the parties to discuss and determine the scope of work and responsibilities of the respective parties. According to the common chronology,
F on 16 October 2015 the parties met to confirm amongst others, manpower mobilisation. On 17 October 2015 the plaintiff's manpower was mobilised on the work site. A kick off meeting was held on 19 October 2015 for piping works mechanical package 2-Manjung 5 to review the scope of work, site arrangement/project master schedule/HSE/QA QC matters.
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- H [9] According to the common chronology, on 14 November 2015 the defendant requested the plaintiff's immediate action to smoothen the piping works. DAELIM issued a warning notice on 18 November 2015 due to the defective works of the plaintiff. Subsequently, the plaintiff discovered that the piping construction exceeded the thickness that the plaintiff had quoted to the defendant. The plaintiff then submitted costing to the defendant for the variation due to the thickness of the piping. On 1 December 2015 the plaintiff notified the defendant of the potential problems that may arise due to the delay in supplying the material.
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[10] The defendant issued a notice of moving out on 26 May 2016 to the plaintiff terminating the agreement and instructed the plaintiff to demobilise from the site, to leave behind materials, plant and equipment belonging to the

plaintiff which will be utilised until the completion of the works. The plaintiff vacated the site on 31 May 2016. The plaintiff maintained that the termination was premature, unlawful and in breach of the agreement.

[11] As a result of the termination the plaintiff contended that it suffered direct losses as follows:

- (a) expenses and costs for idle manpower from June–September 2016 due to the early termination of the subcontract in the sum of RM1,522,328;
- (b) direct and indirect expenses including housing deposits, utilities, levy/visa/special passes, demobilisation costs, unused gas cylinders and transportation charge, sewage (toilet clearing) — Indah Water, waste removal RO RO Bin the total sum of RM97,108.14; and
- (c) loss of profit equivalent to 20% of the unfinished works (balance invoice) in the sum of RM455,648.10.

[12] The computation for the expenses and costs of idle manpower from June–September 2016 are as detailed in the statement of claim:

S No	Trades	Qty/ Nos	Unit rate per hour	Unit rate per day	Total days (from June–September 2016)	Amount/ employee in RM	Total Amount
1.	Site Manager	1	39.5	316	74	23,384	23,384
2.	Engineer	4	32.5	260	74	19,240	76,960
3.	Safety Officer	1	35	280	74	20,720	20,720
4.	QA/QC	2	32.5	260	74	19,240	38,480
5.	Malt contl	1	32.5	188	74	13,912	13,912
6.	Document Controller	1	24.5	196	74	14,504	14,504
7.	Safety Co-Ordinator	1	22.5	180	74	13,320	13,320
8.	Site admin	2	24.5	196	74	14,504	29,008
9.	Driver	2	16.5	132	74	9,768	19,536
10.	Electrician	2	20.5	164	74	12,136	24,272
11.	Storekeeper	2	18.5	148	74	10,952	21,904
12.	Piping foreman	4	22.5	180	74	13,320	53,280
13.	Rigging foreman	6	20.5	164	74	12,136	72,816
14.	Scaffolding foreman	1	21	168	74	12,432	12,432

A	S No	Trades	Qty/ Nos	Unit rate per hour	Unit rate per day	Total days (from June–September 2016)	Amount/ employee in RM	Total Amount
	15.	Welding foreman	3	21.5	172	74	12,728	38,184
B	16.	Pipe fitter	9	20.5	164	74	12,136	109,224
	17.	Structural Fitter	4	18.5	148	74	10,952	43,808
C	18.	Pipe Welder	12	20	160	74	11,840	142,080
	19.	Structural Welder	6	18.5	148	74	10,952	65,712
D	20.	Riggers	42	17.5	140	74	10,360	435,120
	21.	Grinder	4	16.5	132	74	9,768	39,072
	22.	General fitter	25	14.5	116	74	8,584	241,600
E		Total	135				296,888	1,522,38
F	S No	Direct and Indirect Cost					Amount In RM	
	1.	Housing Deposits					23,120	
G	2.	Utilities Deposits					6,280	
	3.	Levy/Visa/Spl Pass					36,668.14	
G	4.	Demobilisation cost					26,300	
	5.	Un-used gas cylinders transport charge					1,300	
G	6.	Sewage (Toilet Clearing) — Indah Water					1,370	
	7.	Waste removal RO RO Bin					2,070	
	8.	TOTAL					97,108.14	

H [13] The plaintiff's computation for the loss of profit equivalent to 20% of the unfinished works are as follows:

Project value — RM6,345,000.00

I Invoice value — RM4,066,759.33

Balance invoice RM2,278,240.67

20% profit from the balance invoice will be the sum of RM455,648.10.

[14] The total claim by the plaintiff as stated in the statement of claim are as follows:

S No	Description	Amount (in RM)
1.	Balance to be paid from so far invoiced for work completed till May 2016	2,027,955.34
2.	Man power idle sdue to early termination	1,522,328
3.	Direct and indirect expenses	97,108.14
4.	20% Profit over the balance billing RM2,278,240.67 (ie RM6,345,000 – RM4,066,759.33 = RM2,278,240.67)	455,648.10
	TOTAL	4,103,039.60

[15] The defendant in its statement of defence pleaded that the defendant terminated the agreement due to a breach by the plaintiff. The plaintiff had failed to comply with the master work program schedule and as a result the works were delayed. According to the defendant, the plaintiff failed to increase the number of workers, machine and work equipment. Further, it was alleged the plaintiff's quality of work was shoddy and defective, consistently falling behind the agreed scheduled timeline. As a result, the progress of the plaintiff's work was severely delayed. The defendant contended they had no other alternative but to terminate the agreement on 26 May 2016 due to the plaintiff's failure to proceed expeditiously to complete the subcontract works as specified in the master work program schedule. The defendant's claim in its counterclaim is the sum of RM2,148,469.32 for works done by the defendant to complete the unfinished works and the cost of rectifying defective works.

THE HIGH COURT'S DECISION

[16] After full trial, the learned trial judge made a number of findings relevant to the issues on appeal, inter alia, as follows:

- (a) the defendant failed to plead that the rates the plaintiff based its claim on were not agreed to by the defendant. Therefore, it was too late to raise any disagreement of the rates at the trial when it was not even pleaded. Furthermore, the defendant failed to raise any contemporaneous challenge in relation to the issue of rates. The defendant is estopped from raising it at the trial. The trial judge found that the defendant had also failed to adduce any evidence to show why the rates were unreasonable and what was, if at all, the reasonable and acceptable rates. The defendant had in fact proceeded to pay the plaintiff progressively until 18 March 2016 as per invoice No 5. A sum of RM1,465,422.74 remained unpaid

- A** for invoices Nos 6–8 being the balance outstanding for works done by the plaintiff. Since the defendant did not dispute the claim for additional works of RM185,960.83 the sum which the defendant must pay the plaintiff is the overall amount of RM1,651,383.57;
- B** (b) the learned trial judge was satisfied that the defendant had sent the plaintiff a list of repair works to be done and identified some of the 50 joints that needed repair with respect to the materials (P92). Complaints were also received by the defendant from DAELIM of the poor quality of works and as a result the defendant had no other alternative but to engage welders from Korea and Thailand to rectify the works. The claim for special damages of RM1,102,558.50 for repair works were not supported by relevant document. However, the learned High Court judge was satisfied on a balance of probabilities that there were genuine repair works that had to be carried out by the defendant arising out of the poor workmanship and unskilled workers. Since the costs of works is more than the retention sum, then the retention sum stands forfeited;
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- D**
- E** (c) on the issue of termination, the learned High Court judge was satisfied that there were sufficient materials delivered to the site. To qualify for a proper extension of time ('EOT') the conditions under cl 7.3 of the agreement must be met. Numerous reminders were issued to the plaintiff which culminated in the issuance of a notice of default followed by a notice of termination of the agreement. Therefore, the termination is proper, valid and lawful;
- F** (d) the plaintiff is not entitled to damages arising from what they contended to be premature and unlawful termination of the subcontract. In the light of the finding of a valid and lawful termination, the plaintiff's claim would only be confined for works done and additional works; and
- G** (e) A sum of RM506,023.67 to be paid to the defendant for agreed consideration for the extra costs in completing the balance works of the plaintiff pursuant to cl 12.4.3 of the agreement.

THE ISSUES IN THIS APPEAL

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- I** [17] The main issues in this appeal can be summarised as follows:
- (a) whether the trial judge erred in law and/or fact when finding and subsequently deciding that the agreement dated 22 December 2015 was rightfully terminated;
- (b) whether the trial judge is correct dismissing the plaintiff's claim of RM1,522,328 for idle manpower;

- (c) whether the trial judge is correct in finding that the defendant is entitled to claim compensation in the sum of RM506,023.67 pursuant to cl 12.4.3 of the agreement; A
- (d) if the agreement was validly terminated whether the defendant is entitled to claim compensation in the sum of RM506,023.67 being the costs of completing the unfinished works valued at RM2,100,512.43 pursuant to cl 12.4.3 of the agreement; B
- (e) whether the trial judge had erred in law and on facts when he decided that the retention sum of RM437,838.17 can be forfeited towards the cost for rectification and repair works; C
- (f) whether the plaintiff is entitled to extension of time to complete the subcontract works; and
- (g) whether the plaintiff is entitled to claim RM97,108.14 for direct and indirect costs and RM455,648.10 for loss and profit. D

WHETHER THE DEFENDANT VALIDLY TERMINATED THE AGREEMENT

[18] The contract period of the main contract is 11 months commencing from 16 October 2015–15 September 2016. The master work program schedule, agreed to by the parties, essentially detailed the various scope of works including the duration to carry out each specific works, the start date and completion of the said works. The first issue would be determinative of the issues in respect of the claim of compensation, loss of profit, indirect costs as well as rectification costs. The trial judge found that the defendant had successfully proved that the plaintiff failed to proceed with the subcontract works diligently, as at the point of termination on 25 May 2016 the subcontract works completed were only 33.3% with 3 1/2 months to go before the scheduled project completion date. The plaintiff failed to demonstrate that due to the insufficient materials by the defendant it had affected the scheduled master work program schedule. Learned counsel for the defendant argued that there was no proper application for EOT pursuant to cl 7.3. Furthermore, the plaintiff's welders were not skilful enough as they had failed the test conducted before they could start welding the P92 pipes. E
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[19] Clause 2 of the agreement stipulates that the plaintiff shall commence the subcontract works upon receipt of the defendant's instruction and shall duly complete the works according to the master work program schedule: I

The Subcontractor shall commence the work upon receipt of the Contractor's written instruction and shall duly complete all Subcontract works within the Master Work Program Schedule.

- A** [20] Prior to mobilising its workers, the plaintiff was informed that 60% of the materials will be made available at the site. However, upon mobilising its workers to the site the plaintiff discovered that the piping materials for only five systems were available. The thickness of the pipes also exceeded the thickness as mentioned in the bill of materials. The plaintiff could only have commenced
- B** the subcontract works effectively if the piping materials were available according to the required specification. Nevertheless, despite the lack of materials, the plaintiff proceeded to carry out the works with the available material in the site.
- C** [21] The materials were only received by the plaintiff on site from January–March 2016, a delay of three months. Some of the piping system works only commenced upon receipt of the materials. The plaintiff informed the defendant through numerous emails of the problems due to the delay in the supply of the materials.
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- E** [22] The plaintiff argued that all reasonable steps were taken to expedite the works on site. They applied for EOT on 5 January 2016 pursuant to cl 7.3 of Part B of the terms and conditions of the agreement. Unfortunately, according to the plaintiff the request for EOT was not considered at all by the defendant. Clause 7.3 of the agreement stipulates as follows:
- Subject to Sub-Clause 10.3, the Subcontractor shall be entitled to an extension to the Time for Completion if he is or will be delayed by any of the Contractor's Liabilities.
- F** On receipt of an application from the Subcontractor, the Contractor shall consider all supporting details provided by the Subcontractor and shall extend the Time for Completion as appropriate.
- G** [23] As soon as the plaintiff knew of the problem due to the delay in supplying permanent materials the plaintiff notified the defendant through various emails as required under cl 10.3 on 'Early Warning':
- A Party shall notify the other as soon as he is aware of any circumstance which may delay or disrupt the Works, or which may give rise to a claim for additional payment. The Subcontractor shall take all reasonable steps to minimise these effects.
- H** The Subcontractor's entitlement to extension to the Time for Completion or additional payment shall be limited to the time and payment which would have been due if he had given prompt notice and had taken all reasonable steps.
- I** [24] The plaintiff notified the defendant via email dated 5 January 2016 of the delay and subsequently requested for an extension of the completion date. The defendant, however, did not respond to the said email in respect of the request for EOT to complete the subcontract works as required under cll 10 and 7.3 of the agreement. Despite not receiving any response from the

defendant, the plaintiff continued carrying out the subcontract works until they were terminated.

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[25] On 25 April 2016 the plaintiff proposed to the defendant that due to the delay in supply of the materials, the master work program schedule should be revised from 11 September–11 December 2016. It is the plaintiff's contention that the defendant did not respond to the proposal to revise the master work program schedule. On 25 June 2016 the plaintiff yet again suggested to the defendant to revise the master work program schedule. The defendant, however did not respond to the suggestion. The defendant's witness, Muhkles bin Hamzah ('DW2') explained during re-examination that he did not respond as the email was not addressed to him personally but specifically addressed to the defendant. DW2 further testified that the reason given by the plaintiff that the delay was due to the supply of materials by the defendant was without basis as the materials for the five systems were available at the site to enable the plaintiff to proceed with the welding works as scheduled. The defendant had also reminded the plaintiff to increase its workforce in order to catch up with the delay. However, this was not done. According to the defendant as at 27 June 2016 only 33.3% of the subcontract works was completed by the plaintiff.

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[26] As a result of the failure of the plaintiff to carry out the subcontract works expeditiously according to the schedule, the defendant claimed it had no other alternative but to terminate the agreement on 26 May 2016. The defendant contended that the plaintiff failed to complete the piping systems as specified in the master work program schedule and according to the agreed timeline despite numerous complaints and reminders. Learned counsel for the plaintiff argued in response that in addition to the pipes materials, the defendant failed to provide trailers and cranes as required, making it impossible for the plaintiff to carry out the works expeditiously as expected. Learned counsel for the plaintiff disagreed with the decision of the learned High Court judge that the plaintiff's workers were unskilled as they failed the test conducted before welding the P92 pipes. The document adduced as evidence by the defendant, 'Overall WQT Back Charge' to plaintiff, did not only contain the names of the plaintiff's welders who attended the welders qualification ('WQT') but also included the names of the defendant's welders. Learned counsel for the plaintiff argued that the persons listed in the document are not all employed by the plaintiff and therefore cannot be relied on.

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[27] The learned High Court judge found that a new detailed master work program schedule of works and its manpower plan must be submitted together with the application for EOT by the plaintiff even though cl 7.3 does not specify such requirement. Since the plaintiff refused and failed to comply with the instructions of the defendant and due to the breach of the subcontract

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A works despite repeated reminders to rectify the breach, the learned judge found that there was a basis for termination of the agreement by the defendant and that the termination was in accordance to the terms of the agreement. A notice of default dated 12 May 2016 was issued by the defendant pursuant to cl 12.1. The plaintiff however, failed to comply with the notice of default which
B resulted in the termination of the agreement pursuant to cl 12.1. Accordingly, the plaintiff is not entitled to any damages arising from what they contended as the termination being unlawful and premature. The learned judge having weighed the evidence before him was satisfied that the various reminders issued to the plaintiff had ultimately culminated in a notice of default followed by a
C notice of termination. The learned judge found that the termination was in the circumstances proper, valid and lawful. In particular, the judge found at paras [90]–[93] of his grounds of judgment:

D [90] As the plaintiff as the subcontractor refused and failed to comply with the instruction of the defendant and due to the breach of the subcontract despite repeated reminders to rectify the breach, the defendant had served a notice of default dated 12 May 2016 pursuant to cl 12.1 of the contract to demand the plaintiff to remedy the default. See the notice of default dated 12 May 2016 at pp 976–978, CBOD-3(2). Clause 12.1 of the contract provide as follows:

E If the Subcontractor abandons the Works, refuses or fails to comply with a valid instruction of the Contractor or fails to proceed expeditiously and without delay, or is, despite a written complaint, in breach of the Contract, the Contractor may give notice referring to this Sub-Clause and stating the default.

F If the Subcontractor has not taken all practicable steps to remedy the default within 14 days after the Subcontractor's receipt of the Contractor's notice, the Contractor may by a second notice given within a further 21 days, terminate the Contract. The Subcontractor shall however wait for further written instruction from the Contractor before proceeding with any demobilization activity. After receipt of such written instruction, the Subcontractor shall then demobilize from the Site leaving behind Materials and Plant and any Subcontractor's Equipment
G which the Contractor instructs in the second notice is to be used until the completion of the Works.

H [91] The plaintiff failed to comply with the notice of default dated 12 May 2016 and so the defendant had by notice dated 26 May 2016 terminated the contract pursuant to cl 12.1 of the contract.

I [92] The present case is not unlike the situation found in *Teknik Segala Sdn Bhd v Salcon Engineering Bhd* [2012] 9 MLJ 529 where the High Court held that the termination was lawful due to the serious delays by the plaintiff despite many notices sent. At p 545 the High Court observed as follows:

[49] It cannot be disputed that there were serious delays in the plaintiffs works under the contract and the defendant had sent many notices relating to the delay for example at p 621 before the termination and at p 660, after the termination. This was acknowledged by PW1 during his evidence in court.

[93] I am satisfied that various reminders had been issued to the plaintiff culminating in a notice of default followed by a notice of termination of the subcontract and that the termination was in the circumstances proper, valid and lawful.

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[28] The judge considered a number of authorities, in particular, *Teknik Segala Sdn Bhd v Salcon Engineering Bhd* [2012] 9 MLJ 529 where it was held by the High Court that the termination was lawful due to serious delays by the plaintiff despite many notices sent. His Lordship also referred to the case of *Kerajaan Malaysia v Ven-Coal Resources Sdn Bhd* [2014] 11 MLJ 218 where His Lordship himself held that each case must be decided on its own merits or the lack of it, taking into consideration all the circumstances some justifying termination and others in favour of affirming the contract:

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[33] The plaintiff contended that the defendant was not likely to complete the project in three and half months based on the history of its delay without taking into consideration the reasonable request of the defendant for EOT of 189 days. The defendant castigated this as a pure conjecture and speculation.

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[34] The learned authors Sundra Rajoo, Dato' WSW Davidson and Ir Harbans Singh KS in *The PAM 2006 Standard Form of Building Contract*, LexisNexis, 2010 at p 553 cautioned employers who are too keen to invoke this ground in cl 25.1(c) of the PAM 2006 Contract which is in pari materia with cl 51(a)(ii) of the PWD 203 (Revised 10/83) Contract as follows:

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Although being in practice the most common ground of determination by the employer due to the contractor's progress being 'slow', it is nevertheless a difficult ground to establish and many a determination premised on it has been ultimately invalidated by the courts and arbitral forum with dire consequences. Therefore, practitioners must not be too hasty to invoke this performance default until they are confident that it can withstand the relevant legal challenges.

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[35] In *West Faulkner Associates v London Borough of Newham* [1994] 422 Con LR 144 it was held as follows:

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In the JCT contracts the phrase requiring the contractor 'to proceed regularly and diligently with the works' means that the contractor must proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of work. The clause requires the contractor to proceed both regularly and diligently. Failure in either respect entitles the employer to terminate the contract.

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[36] The learned authors Chappell, Marshall, Powell-Smith and Cavender in *Building Contract Dictionary* (3rd Ed) at pp 348–349 explained the meaning of the phrase 'regularly and diligently' as follows:

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... This phrase probably means more than an express restatement of the contractor's common law obligation as to progress ie it must bear some

- A relationship to the specified date of completion and his progress must be constant, systematic and industrious. Whether or not the contractual standard is achieved is probably best judged objectively having regard to such matters as:
- B — The number of men retained on site compared to the number one would expect to be needed by a competent and experienced contractor faced with the same relevant commitments.
- C — The plant and other equipment employed on the work in relation to the type and volume of work to be undertaken in the time available for completion.
- C — The progress actually being made on the site relative to the volume and complexity of the work still to do to achieve contractual completion.
- D A slow rate of progress judged against the performance of other contractors is an indicator that the contractor is not proceeding ‘regularly and diligently’ although low productivity on site may well be explained by other factors which are outside the contractor’s control. Hence, account must also be taken of any extenuating circumstances that are outside the contractor’s control which are hindering, or which may in due course hinder or prevent, the desired rate of progress.
- E There is also at least one line of authority making it clear that merely going slowly is not, in itself a breach of contract and it will always be a difficult question to decide whether a contractor’s progress amounts, in fact, to a failure to proceed regularly and diligently. However, the Court of Appeal has now given some useful guidance on the matter. ‘What particularly is supplied by the word ‘regularly’: is not least a requirement to attend for work on a regular daily basis with sufficient in the way of
- F men, materials and plant to have the physical capacity to progress the works substantially in accordance with the contractual obligations. What in particular the word ‘diligently’ contributes to the concept is the need to apply that physical capacity industriously and efficiently towards the same end. Taken together, the obligation upon the contractor is essentially to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of work’: *West Faulkner Associates v The London Borough of Newham* (1995) 11 Const LJ 157 per Simon Brown LJ at p 161.
- G That view usefully expands on previous judicial opinion which acknowledges that whereas the words generally convey a sense of activity, of orderly progress, of industry and perseverance, ‘such words provide little help on the question of how much activity, progress and so on is to be expected ...’: *London Borough of Hounslow v Twickenham Garden Developments Ltd* (1970) 7 BLR 81 ...
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- I [29] The terms and conditions of an agreement entered between the parties cannot be simply brushed aside and ignored. The Federal Court in the case of *Lucy Wong Nyuk King (F) & Anor v Hwang Mee Hiong (F)* [2016] 3 MLJ 689; [2016] 4 CLJ 813 through the judgment of Azahar Mohammad FCJ explained the principle of construing a contract:

... it is an established principle of construing a contract that, among others, a contract must be construed as a whole, in order to ascertain the true meaning of its several clauses, and also, so far as practicable, to give effect to every part of it. Each clause in an ordinary commercial contract should be so interpreted as to bring them into harmony with the other clauses of the contract (see *National Coal Board v Wm Neill & Son (St Helens) Ltd* [1984] 1 All ER 555 which was cited in *Royal Selangor Golf Club v Anglo-Oriental (M) Sdn Bhd* [1990] 1 CLJ 995; [1990] 3 CLJ Rep 37 and *Mulpha Pacific Sdn Bhd v Paramount Corporation Bhd* [2003] 4 MLJ 357; [2003] 4 CLJ 294). In *Australian Broadcasting Commission v Australasian Performing Right Association Limited* [1973] 129 CLR 99, it was held that the whole of the contract has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another.

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[30] The agreement represents the intention of the parties, defining the obligations of the parties and thus must be strictly adhered. Clause 12.1 of the agreement provides that if the plaintiff abandons the works and refuses or fails to comply with a valid instruction of the defendant; or fails to proceed expeditiously and without any delay; or is in breach of the agreement, the defendant as the contractor may give notice referring to cl 12.1 and, stating the default. If the plaintiff fails to take any practicable steps to remedy the default within the prescribed 14 days after the receipt of the defendant's notice, the defendant will then issue another notice giving a further 21 days before terminating the subcontract. Reading cl 12.1 exactly as written meant that the plaintiff is given time to rectify the breach, if any:

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If the Subcontractor abandons the Works, refuses or fails to comply with a valid instruction of the Contractor or fails to proceed expeditiously and without delay, or is, despite a written complaint, in breach of the Contract, the Contractor may give notice referring to this Sub-Clause and stating the default. If the Subcontractor has not taken all practicable steps to remedy the default within 14 days after the Subcontractor's receipt of the Contractor's notice, the Contractor may by a second notice given within a further 21 days, terminate the Contract. The Subcontractor shall however wait for further written instruction from the Contractor before proceeding with any demobilization activity. After receipt of such written instruction, the Subcontractor shall then demobilize from the Site leaving behind Materials and Plant and any Subcontractor's Equipment which the Contractor instructs in the second notice is to be used until the completion of the Works.

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[31] It seems necessary to give some description of how the allegations of breach are pleaded in the statement of defence to understand the defendant's action to terminate the agreement:

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19. Defendan akan mengatakan bahawa dari penilaian Defendan, Plaintiff telah didapati gagal menyediakan pekerja-pekerja yang secukupnya untuk menjalankan kerja-kerja tersebut menyebabkan kelewatan yang ketara di dalam progress kerja Plaintiff.

- A 20. Selanjutnya Defendan akan mengatakan bahawa ketika lawatan tapak diadakan didapati tiada pekerja-pekerja Plaintiff yang secukupnya untuk menyempurnakan kerja-kerja di tapak dan Defendan telah memberikan peringatan kepada Paintif agar meningkat prestasi kerja.
- B 21. Defendan akan mengatakan bahawa Plaintiff juga telah mengadakan perjumpaan terus dengan Daelim (M) Sdn Bhd iaitu kontraktor utama tanpa pengetahuan Defendan pada 15.2.2016 dan pada 18.1.2016 memasuki perjanjian dengan Daelim (M) Sdn Bhd untuk melakukan dan menyiapkan kerja-kerja pemasangan paip yang gagal disiapkan oleh Plaintiff.
- C 22. Defendan mengatakan bahawa akibat daripada kemungkiran oleh Plaintiff di dalam menyiapkan kerja-kerja tersebut di mana tahap kemajuan projek amat rendah dan perlahan serta kerja yang tidak mematuhi arahan pengurus tapak, spesifikasi dan pelan kerja yang diluluskan oleh Defendan walaupun Notis-notis Peringatan diberikan, maka Defendan telah melalui surat bertarikh 26.5.2016 menamatkan kontrak antara Plaintiff dan Defendan.
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- [32] As reflected in the statement of defence the basis of termination by the defendant is the failure of the plaintiff to provide sufficient manpower and to complete the subcontract works expeditiously. The notice of default dated 12 May 2016 reads as follows:
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TECHNOFIT

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Ref. No. : TSB/PR/16/003
Date : May 12, 2016

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PORATHA CORPORATION SDN BHD.
No. 3A, Jalan Indah 16/12,
Taman Bukit Indah, 81200,
Johor Bahru.

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Attention: Mr Naresh Nair

RE: Notice of Default Subcontract TSB-CON-15-002

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We refer to your letter dated 6th May 2016.

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It has come to our attention that Poratha has failed to proceed expeditiously to complete the individual piping systems within their respective completion dates as specified in the Master Work Program Schedule of the Subcontract Agreement, despite our numerous written complaints. [Appendix 1]

Hence, we must address the following defaults committed by Poratha during the performance of the contract, or lack thereof:

1. During the beginning of the project, we found that Poratha failed to mobilize sufficient numbers of PMT, machineries, tools and consumables required, resulting in a lot of inconvenient matters arise at the project work site. Allocation of manpower at the designated area was inadequate and had delayed the progress. Our client have given instruction to mobilize the additional manpower in order to achieve the daily target however you did not take any immediate action to remedy the situation. [Appendix 2]
2. Quality of work was another serious issue that we face during the project execution. The lack of good quality P92 welders from Poratha has resulted in poor welding result and various welding defects discovered. This has clearly demonstrated that welders provided by Poratha were not competent enough to weld P92 materials. On top of that, Poratha's welders have also repeatedly failed the WQT conducted, causing constant short supply of qualified welders available to perform the work. This has led to further delay to the project schedule. [Appendix 3]

3. Paratha has also failed to comply with or deliberately ignore valid instructions from Technofit project team. As per site requirement, the working hour starts from 0700 hrs until 1800 hrs. However, your workers have repeatedly stopped the work and left the work site at 1600. Even though this issue has been discussed at length and agreed between both parties, the same issue arises again. Another issue that we are deeply concerned about is Paratha not attending on repair joint exercise. This has caused the numbers of accepted welding joint were still low compared to the targeted achievement numbers. Both of the reasons mentioned in this paragraph had huge negative impact on progress and daily target. [Appendix 4]

TECHNOFIT SDN BHD (409136-W)

Lot 2 & 3, Jalan PPS 1, Pusat Perdagangan Selat,
100 Batu Caves, Selangor Darul Ehsan, Malaysia.
Tel : 603-6178 7848 Fax : 603-6178 7883
mail : technofit@technofit.com.my



4. We must emphasize that, despite the poor showings by Paratha during the execution of the project so far, we have not failed to pay Paratha for the works done at site which have already been verified. Up to this date, we have made payment for your invoices totaling RM 1,920,175.80 to Paratha. With regards to the outstanding invoice payment as per your letter, we would like to reiterate our commitment to pay the amount after duly verified by our internal party. Therefore Paratha should not ever doubt our intention regarding invoices payment.
5. We must also emphasize that, despite the lack of commitment from Paratha to resolve issues at work site, Technofit on our own has made an initiative to rectify the issue in order to make sure the project implementation is going smooth. As evidence, when Paratha's welders were having serious welding quality problems, we did engage with our own qualified competent welders from Korea and Thailand to swiftly rectify welding rejection issue. We did bear portions of the cost and assist Paratha to achieve the project target, although the responsibility for the execution and completion of the subcontracted works and the remedying of any defects therein lies solely with Paratha, as per the subcontract agreement.
6. We have also taken out the scope package involving with heavy wall thickness. We carried out the remaining balance of heavy wall thickness pipe works by ourselves for the sake for expediting the progress to meet the project delivery schedule. We also agreed and already reimbursed the cost associated with the heavy wall thickness pipe that has been erected previously by Paratha.
7. Prior to issuing our letter Ref No:TSB/PR/16/002 dated 30th of April 2006, concerning the De-scope matters, we believe you have been made aware of the requirement that you need to deliver the package based on schedule previously agreed and verified by both parties on 30th April 2016. In an official email communication sent by you to Mr. Sugumaran, you did confirm that you were fully aware of the requirements and intended to continue and complete the remaining works. We did even consider your remaining incurred cost to complete the work based on contract requirement and we did send you another letter ref No: TCF-PCSB-M002-Let-0005 dated 7th of May 2016 to request acceleration cost from you for submission for completion by mid-August. Shortly, we received your reply letter on 9th of May 2016, and we can conclude from the said letter, that Paratha have no intention to complete the work in accordance with the contract requirement and your request for rather unreasonable cost which is unacceptable. We would like to affirm that our decision to de-scope Paratha scope of works under the subcontract mentioned above was made according within provisions of the contract. We will immediately take necessary action to meet the contract requirement and all cost incurred shall be back-charged to you. [Appendix 5]

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8. Based on the scenarios described above, it is clear and apparent that Poratha is liable for the events which have contributed to delayed progress of the project and resultant complaints from our client. Also, as the result of Poratha's defaults, Technofit have incurred substantial cost to keep up with project schedule. On top of that, judging from your latest letter dated 9th of May 2016, Poratha did not have an interest to fulfill the contract requirement. We must also mention that this issue caused by Poratha has tarnished our reputation as a contractor involved in national projects.

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9. We serve this notice pursuant to the rights that we possessed under Clause 12.1 Default by Subcontractor of the SUBCONTRACT AGREEMENT FOR MECHANICAL WORK PACKAGE 2- PIPING WORK. We seek for Poratha's immediate and serious action so that this matters can be resolved amicably. We are also aware of consequences of utilizing this clause and dispute on this demand will be followed up accordingly. Hence, with the contractual consideration applicable, we issue this notice as per clause 12.1 Default by Subcontractor in order for you to commit as per contract requirement.

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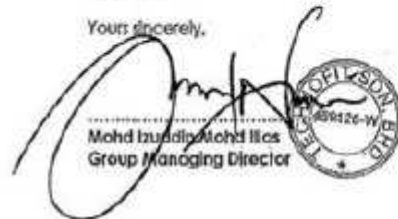
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Thank you.

Yours sincerely,

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Mohd Izuddin Mohd Iles
Group Managing Director



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[33] The notice of default dated 12 May 2016 was issued pursuant to cl 12.1 of the agreement but it failed to mention the 14 days as required under the said clause, that is, for the plaintiff to rectify the default/defect. The plaintiff explained the reasons for the delay but this was not addressed by the defendant.

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[34] Without waiting for the rectification of the purported default and the expiry of 14 days plus the further 21 days as stipulated under cl 12.1 of the agreement, the defendant proceeded to terminate the agreement and issued the following notice of termination dated 26 May 2016:

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TECHNOFIT 131

Ref. No. : TSB/PR/16/004
Date : May 26, 2016

PORATHA CORPORATION SDN BHD
No. 3A, Jalan Indah 16/12,
Taman Bukit Indah,
81200 Johor Bahru.

Dear Mr. Nareesh Nair,

RE: NOTICE OF TERMINATION SUBCONTRACT TSB-CON-15-002

We refer to the above matter.

We also refer to our notice to you dated 12.5.2016.

We wish to inform you that pursuant to the contract you shall commence the works upon receipt from our written instruction and shall duly complete all the Subcontract Works within the master Work Program Schedule.

We wish to inform you that you have breached the terms and conditions of the agreement the particulars of which are as follows:-

- a) That you have failed to mobilize sufficient numbers of PMT, tools and consumables required and had resulted a lot of inconvenient matters at the site.
- b) That you have failed to allocate sufficient manpower at the work area and had delayed the progress of work.
- c) That you have failed to provide a good quality P92 welders resulting in poor welding result and various welding defects discovered.
- d) That you have failed to comply with the site requirement whereby the working hour starts from 7.00 am until 6.00 pm. We discovered that your workers have repeatedly stopped the work and left the work site at 4.00 pm.

Kindly also take notice that despite repeated instructions and reminder send to you, you have failed to take an immediate action to remedy the breach causing delayed in the work progress.

As a result of your failure to comply with our instruction, we had no alternative but to rectify the defect in order to ensure that the project implementation is going smooth. We have also taken out the scope package involving with heavy wall thickness and had carried out the remaining balance of heavy wall thickness pipe works.

Kindly also take notice that as a result of your default, we have suffered and incurred substantial cost to keep up with project schedule.

TECHNOFIT SDN BHD (429116-W)

No. 2 & 3, Jalan PPS 1, Pusat Perniagaan Selatoh,
68100 Batu Caves, Selangor Darul Ehsan, Malaysia.
Tel : 603-6178 7848 Fax : 603-6178 7883
Email : technofit@technofit.com.my



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We have by a notice dated 12.5.2016 pursuant to clause 12.1 of the contract reminded you to comply with the notice but you have failed, neglected or refused to comply with the said notice.

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Therefore pursuant to clause 12.1 and in light of your failure to comply with the requirements set out in the said Subcontract Agreement and our instructions, ~~we hereby terminate the said agreement~~ and we shall therefore exercise our right to proceed with issuing written instruction to you to demobilise from the site leaving behind Materials and Plant and any of your Equipment which to be used until the completion of the Works.

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Yours faithfully,



N. Sugumaran
Executive Director

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[35] The learned judge devoted a considerable part of his judgment analysing the reasons for the failure of the plaintiff to proceed expeditiously resulting in delay in completing the subcontract works. The plaintiff failed to provide sufficient number of skilled and experienced welders as well as to provide additional manpower in order to achieve the daily target. Despite repeated reminders the plaintiff did not take any immediate action to rectify. It is also contended by learned counsel for the defendant that the plaintiff also failed to submit its repair plan. The learned judge placed reliance upon the fact that the plaintiff had failed to proceed expeditiously and was behind the scheduled completion. Whilst the judge was right to observe that there was a delay, he must examine the terms of the agreement, in particular cl 12.1 before being able to conclude whether the termination is valid or otherwise.

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[36] Clause 12.1 defined clearly the steps to be taken if there is a delay in the completion of the subcontract works. Clause 12.1 stipulates that the defendant may issue a notice of default stating the default if the plaintiff abandons the works, refuses or fails to comply with a valid instruction of the defendant or fails to proceed expeditiously and without delay, or is, despite a written complaint, in breach of the agreement. This the defendant did on 12 May 2016. By the said notice the plaintiff must take all practicable steps to remedy the default within 14 days after the receipt of the defendant's notice. If the plaintiff fails to rectify the default the defendant may give a notice to terminate the contract after the expiry of 21 days. The 14 days expired on 26 May 2016.

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The earliest, if at all, for the defendant to issue a second notice giving 21 days would have been on 27 May 2016 since the right to terminate only arises after 26 May 2016. Hence, it is clear that the defendant did not comply with the terms as stipulated under cl 12.1. A proper construction of cl 12.1 must be invoked and satisfied before termination can be validly exercised. The plaintiff

must be given an opportunity to meaningfully remedy any unsatisfactory performance or default. For termination under cl 12.1 there must be a failure or a refusal by the plaintiff to remedy the default. The failure or refusal would be the basis upon which a termination under cl 12.1 can be exercised by the defendant, that is, after the expiry of stipulated 21 days. The learned judge failed to consider the requirements of clause 12 and decided that the termination is valid. His Lordship did not give any reason why the stipulated time given under the aforesaid clause need not be complied by the defendant.

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[37] Gopal Sri Ram FCJ (as His Lordship then was) in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 adopting the British authorities, ie *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98; [1998] 1 WLR 896 observed:

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The most recent statement of the guideline to interpretation of contract statutes and other instruments is to be found in *Attorney General of Belize v Belize Telecom* [2009] UKPC 10, where delivering the advice of the board, Lord Hoffman said:

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The Court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms or make it fairer or more reasonable. If it is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed... It is this objective meaning which is conventionally called the intention of the parties or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

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[38] The Federal Court in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177 reversed the decision of the High Court and the Court of Appeal on the central issue on the interpretation of an agreement and held that the termination of the agreement therein was wrongful. The Federal Court referred to an article by Professor Richard Hooley *Implied Terms After Belize Telecom* [2014] 73 CLJ 315 at pp 324–325 summarising Lord Hoffman's principles in Belize:

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- (1) A court has no power to improve the instrument it is asked to construe whether to make it fairer or more reasonable. It is concerned only to discover what the instrument means.
- (2) That meaning is what the instrument would convey to a 'reasonable person' or 'reasonable addressee' having all the background knowledge which would reasonably be available to the audience to whom the

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- A instrument is addressed. This objective meaning of the instrument is what is conventionally called the intention of the parties or of whoever is the deemed author of the instrument.
- (3) The question of implication arises where an instrument does not expressly provide for what is to happen when some event occurs. In most cases, the usual inference is that nothing is to happen, and the express provisions of the instrument continue to operate undisturbed. If the event causes loss to one of the parties, the loss lies where it falls.
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- (4) In some cases, however, the 'reasonable addressee' of the instrument will conclude that the only meaning which the instrument can have, consistent with its other terms and the relevant background is that something is to happen in response to the particular event that has not been expressly provided for in the instrument's terms. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs.
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- (5) Nevertheless, that process does not add another term to the instrument; it only spells out what the instrument means. In other words, the implication of a term is an exercise in the construction of the instrument as a whole.
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- E (6) It follows that in every case of implication, the single question for the court is whether the implied term would spell out in express words what the instrument, read as a whole against the relevant background, would reasonably be understood to mean.
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- G [39] It is not for the court to rewrite the terms of an agreement. The terms and conditions of the agreement in this appeal before us are clear and unambiguous. upon perusal it is quite clear the learned judge did not accord sufficient judicial appreciation of the agreement and the evidence placed before him and that he failed to take into account the prerequisites of termination under cl 12.1. The learned judge failed to apply the correct principles of construction of contract. We find contrary to the finding of the learned judge that the termination is premature and invalid. The learned judge had completely disregarded the terms of the agreement, in particular, the non-adherence of the provision cl 12.1 by the defendant. We agree with the plaintiff that the learned judge misdirected himself and that the circumstances and the evidence do not permit us or any reasonable court which had properly directed itself to hold the termination valid. In our judgment, the termination of the agreement on 26 May 2016 is premature, invalid and wrong.
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- I DAMAGES

[40] At the outset of the appeal the defendant abandoned its claim on loss of profits.

[41] The learned judge found the termination of the agreement by the defendant valid and lawful, and dismissed the plaintiff's claim for damages arising from premature and unlawful termination. The plaintiff contended that due to the premature termination, the plaintiff was unable to utilise the demobilised workers for the project as the workers were specifically assigned to work for this subcontract works for the duration of the contract, which is until the original completion date of 15 September 2016. The claim is premised on the basis that 135 workers could not be utilised by the plaintiff due to the premature termination and could not be deployed. Given that the termination is premature and unlawful the plaintiff is entitled to the claim for idle manpower costs. We agree with learned counsel for the plaintiff that the direct and indirect costs are not too remote and are in fact foreseeable losses that the plaintiff suffered as result of the premature termination. The plaintiff's claim is also supported by the evidence adduced.

[42] Accordingly, we allowed the plaintiff's claim for idling manpower costs of RM1,522,327 and the costs for direct and indirect expenses of RM97,208.14 with interest at 5%pa from the date of judgment until the date of full settlement.

[43] In para 59 of his grounds of judgement the learned judge found that even though the claim for special damages were not supported by documentary evidence he was satisfied on a balance of probabilities that the defendant had carried out works:

[59] Here is a case where the claim for special damages of RM1,102,558.50 for repair works are not fully supported by the relevant documents but that this court is nevertheless satisfied on a balance of probabilities that there were genuine repair works that had to be carried out by the defendant arising out of contemporaneous documents capturing the nature of the defects arising out of poor workmanship and unskilled workers.

[44] It is trite law that the party claiming damages bears the burden of proving the fact and quantum of damages suffered. Edgar Joseph Jr FCJ, writing on behalf of the Federal Court, in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1994] 1 CLJ 15 elucidated, at p 784 (MLJ); p 20 paras b–f (CLJ):

Firstly, that part of the judgment of the judge which provides that the vendor shall pay to the purchaser damages to be assessed for wrongful termination of the agreement with costs and that Tan Sri Khoo and the Vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the purchaser of satisfying the fundamental requirement of having *to prove its loss* (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying, we are reminded of the words of

- A Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* 64, TLR 177 at p 178:
— plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying:
- B ‘This is what I have lost, I ask you to give me these damages’. They have to prove it.
- This dictum was referred to and applied by our Court of Appeal in *John v Dharmaratnam* [1962] 1 MLJ 187.
- C And, in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, the court had occasion to say this (at p 367):
- D It is axiomatic that a plaintiff seeking substantial damages has the, burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v William*). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages.
- E See, for example *Dixon v Deveridge* and *Twyman v Knowles*.
- In *Malaysian Rubber Development Corporation Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569 at p 582 E–F, Mohd Dzaiddin SCJ, speaking for the Supreme Court quoted, with approval, the above passage in the *Popular Industries* case.
- F [45] The defendant bears the burden of proving both the fact and the amount of damages suffered as a result of the breach by the plaintiff. Special damages unlike general damages must be specifically pleaded and strictly proved, and recoverable only where they can be included in the proper measure of damages (see *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30;
- G [1984] 2 CLJ 163 (FC) and *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324; [1983] 2 CLJ 198 (FC) and *Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672).
- H [46] The Court of Appeal in *Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor* [2012] MLJU 159; [2012] 5 CLJ 229 held, inter alia, as follows:
- I It is trite law that the task of accounts and assessment of damages is an exercise of judicial discretion. Such discretion is a judicial one, as it is not exercised based on whims and fancies, but by reference, guidance and application of established judicial principles and of course having regard to all the facts and evidence adduced before the officer or the judge who undertakes the assessment.

[47] In the light of the above settled principles and law on assessment of special damages the learned High Court judge having found the counterclaim

were not fully supported with documentary evidence, should have dismissed the counterclaim.

A

CONCLUSION

[48] After having heard the parties at length and upon careful perusal of the records of appeals, we are of the considered opinion that this is a case in which appellate intervention was warranted. For all the reasons set out above, we were unanimous in our decision that this appeal must be and was allowed with costs. The plaintiff had proved its claim that the termination of the subcontract is premature and invalid, and as result, suffered losses. The defendant, on the other hand, had not discharged its burden of proof and would not have been entitled to its counterclaim, even if the plaintiff had failed in proving its case.

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[49] Consequently, we set aside the order of the High Court; the plaintiff's claim as set out in paras 9.1 and 9.2 of the statement of claim was allowed with interest of 5%pa until the date of full settlement and the counterclaim was dismissed. As for costs, we awarded a sum of RM10,000 to the appellant to be paid by the respondent subject to payment of allocatur. We also ordered that the deposit be refunded to the appellant.

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Order accordingly.

Reported by Ashok Kumar

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